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TAKINGS AND RETROACTIVITY

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Regulatory Takings and Resources: What are the Constitutional Limits?

Natural Resources Law Center
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TAKINGS AND RETROACTIVITY

Jan G. Laitos

I. INTRODUCTION

A Summary

While the Takings Clause of the United States Constitution has lately been receiving much attention from the United States Supreme Court, another concept closely linked to takings - retroactivity - has been of even more interest to the Court recently. In 1994, the Court is expected to decide at least five important retroactivity cases, many of which will help better define the contours of the Takings Clause. It is the retroactivity of a law, perhaps moreso than the law's potential to "take" private property, that should be of greatest interest to those wishing to challenge a law that burdens property.

When a private party alleges that a law has "taken" that party's private property, it is often the retroactive aspects of the law that causes the psychological harm that precipitates the takings litigation. Typically, decisions involving property are made pursuant to and consistent with existing law. The law which allegedly "takes" the property is a law which *changes* that existing law, so as to either deprive the property owner of a pre-existing right, or impose a new duty. It is the fact of a change in the law, applied to existing expectations regarding the property, arising under then-existing law, which produces both the economic

harm, and the feeling (on the part of the property owner) that it has been somehow *unfair* to impose the new law retroactivity.

Throughout the 19th and early part of the 20th centuries, retroactivity was an independent basis for voiding laws which interfered with so-called "vested rights." However, beginning in the 1940s, retroactivity became only one of several factors to consider in assessing whether a law affecting private property had violated the Takings or Due Process Clauses. Rather than focus on the retroactive nature of the law in question, other factors (e.g., the likelihood of the law advancing a legitimate state interest) became more important to courts considering a law's constitutionality. The presence or absence of a vested right in the property affected was largely irrelevant, in part because property was increasingly viewed as being comprised as a "bundle of sticks," where the nature of the stick impacted by the law was the critical determination.

The current law of retroactivity has returned to a "vested rights" test. See *Landgraf v. USI Film Products*, 1994 WL 144450 (U.S., April 26, 1994) [hereinafter Landgraf]. Moreover, the retroactive nature and effect of a law is not just a factor to consider as part of a takings analysis. In many cases, the fact of a law's retroactivity will cause of the law in question to be a taking. This will occur in two situations: First, a law affecting private property will likely be a taking of that property when the law manifests "primary" retroactivity altering the past legal consequences of past private behavior. Second, a law affecting private property

may also be a taking if (1) the law constitutes "secondary" retroactivity (altering the future legal consequences of past private behavior), and (2) the property affected has "protected legal status" (i.e., the Taking Clause protects the property from secondary retroactive application of the law).

B. References

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W. David Slawson, *Constitutional and Retroactive Lawmaking*, 48 *Cal. L. Rev.* 216 (1960).

Elmer E. Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 *Minn. L. Rev.* 775 (1936).

II. HISTORY OF RETROACTIVITY

A. Vested-Rights Retroactivity

Retroactivity was an organizing principle in constitutional protection of private property prior to the development of substantive due process. The leading definition of a retroactive law was offered by Justice Story in *Society for the Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756 (C.C.D.N.H. 1814): "[A retroactive law] takes away or impairs vested rights acquired under existing laws,

or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.” Under this definition, the critical retroactive element of a law was not whether the law took effect before its applicable date, but whether it operated so as to alter some pre-existing legal interest. One hundred and eighty years later, in *Landgraf* (1994), the Supreme Court returned to this conception of retroactivity.

Vested rights retroactivity permitted lawmakers to change rules affecting property interests without violating the proscription against altering pre-existing rights deemed to be vested. Retroactive laws could still reach all interests not defined as being vested, thereby avoiding the freezing of existing property rules that would have occurred if they had been immune from legislative change. See, e.g., *Calder v. Bull*, 3 U.S. (3 386 (1798)); *Watson v. Mercer*, 33 U.S. (8 Pet.) 88 (1834).

B. The Rise of Substantive Due Process and the Decline of Retroactivity

Between the 1930s and the latter part of the 20th century, interference with existing property rights was largely judged according to substantive due process standards, and not according to vested rights retroactivity. Under due process analysis, a law's retroactive effect was only a factor to consider; it was not determinative. Moreover, vested rights were no longer thought to be a useful test

for whether retroactive laws were valid. This was because commentators and courts believed that the term "vested right" was conclusory, and most often used to justify the invalidation of a retroactive law that was defective for reasons other than the law's impact on vested rights.

The substantive due process test began to play the same role as vesting analysis once did. Under substantive due process, the question was not the effect of the retroactive law on a vested right, but the usefulness of retroactivity as a means of carrying out the goal of the law. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Retroactivity continued to have independent viability only in one specialized context. This was when a property owner had in good faith relied upon acts or assurances by government officials, and in doing so had made such a substantial change in position that it would be inequitable to take away rights acquired as a result of this reliance. In such a case, the government was equitably estopped from retroactivity disturbing existing rights.

This government estoppel theory was eventually adopted by the Supreme Court as a test to be used in takings analysis. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), the Court stated that one factor that should be taken into account when determining whether a regulation effects a taking was whether it had "interfered with reasonable investment-backed expectations." A reasonable investment-backed expectation had to more than an unilateral expectation or "an abstract need." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). There could be no taking

based on the "expectation" theory advanced in *Penn Central* if the private property owner affected by the retroactive law had either long been subject to similar laws, or somehow been put on notice that a change in the law was inevitable. *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2291-2 (1993).

Most private parties affected by retroactive federal legislation focus on the degree to which the new law has interfered in the future with past economic investments. The Supreme Court, on the other hand, because of its disinclination to find takings, instead concentrates its attention on whether a private party's expectations are "reasonable," and the nature of the "expectation" that allegedly has been interfered with by the retroactive law. An expectation that an existing federal law will not change is not reasonable when the party affected by the change has notice of the likelihood of some future change. *United States v. Locke*, 471 U.S. 84, 106 (1985). This notice can be constructive, and be implied if those subject to the new law operate in a heavily regulated field. *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958). An expectation is not reasonable if the party asserting its interference has, prior to the changed law, voluntarily assumed the risk of some subsequent change. *Yee v. City of Escondido*, 112 S.Ct. 1522, 1531 (1992). An expectation also may not be reasonable if it is held by someone other than the party alleging the taking. *Hodel v. Irving*, 481 U.S. 704, 715 (1987).

Nor does a private party have an expectation that immunizes it from subsequent federal legislation if that party's prior legal relationship with a federal

entity belies any reliance on the absence of future legislative amendments. Two aspects of the prior legal relationship produce a presumption that the expectation should be one of change, and not one of no change. First, if the party alleging a taking has "long been subject to federal regulation, [then] [t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Locke*, *supra* at 106 n.15. Second, if the complaining party has a contract with the federal government, whose consequences are then altered by subsequent legislation, there is no taking if the terms of the contract have provided notice that future change is possible. Even if a private party has a reasonable expectation of no change, there is still not a taking if that party's investment-backed expectations "can continue to be realized as long as he complies with, reasonable regulatory restrictions" *Cisneros v. Alpine Ridge Group*, 113 S.Ct. 1898, 1902-03 (1993).

Perhaps the only expectation that will be consistently protected by the Court is one that is explicitly guaranteed by the federal government. When, for example, a federal statute gives a company explicit assurances that a federal agency is prohibited from disclosing publicly any data submitted to the agency by the company, the company's security in the confidentiality of the data has protected legal status, immunizing it (through the Takings Clause) from legislative amendments retroactively authorizing disclosure of the data. *Ruckelshaus*, *supra* at 1011.

By the 1990s, retroactivity was increasingly viewed as a component of both substantive due process and takings analyses. It was not usually an independent grounds for invalidating laws. See *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). Vested rights retroactivity had been largely abandoned by the courts. To the extent retroactivity survived at all as an argument against laws which interfered with property, it was usually in the context of takings claims. And as a factor to consider in takings cases, it was relatively insignificant.

III. MODERN RETROACTIVITY

A. Manifestations of Retroactivity

There are three general ways by which a law can be retroactively applied:

Legislative Enactments - When there is a statute, there is a presumption that it is to be prospective only. This presumption can be overcome only if there is clear legislative intent that the statute is to be retroactive. *Landgraf*; *Mojica v. Gannett Co.*, 7 F.3d 552 (7th Cir. 1993); *U.S. v. TRW, Inc.*, 4 F.3d 416 (6th Cir. 1993); *Bradley v. Pizzaco of Nebraska*, 7 F.3d 795 (8th Cir. 1993).

Administrative Rules - The Supreme Court has noted that administrative rules must be statements that have legal consequences only for the future. *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). They are permitted if

the power to promulgate them is conveyed by Congress in express terms. *Cal-Almond, Inc. v. U.S. Dept of Agriculture*, 14 F.3d 429, 442 (9th Cir.1993).

Court Decisions - In 1993, in *Harper v. Virginia Department of Taxation*, 113 S.Ct. 2510 (1993), the Supreme Court held that when a court applies a new rule of federal law to the parties before it, the new rule must be given full retroactive effect (1) in all cases still open on direct review, and (2) to all events predating the new rule. When a court explicitly leaves open all questions regarding the retroactive application of its decision, and does not apply the new rule to the parties before it, a case-by-case balancing of several factors determines whether the new decision is to have retroactive effect. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). *Ferguson v. Roberts*, 11 F.3d 696, 700-01 (7th Cir.1993).

B. Landgraf and the Return of Vested Rights Retroactivity

On April 26, 1994, the Landgraf Court signalled a return to vested rights retroactivity, as well as the possible emergence of retroactivity as a separate ground for attacking laws that affect private property rights. The majority opinion creates a presumption of prospectivity for all non-judicial law changes, rebuttable only by evidence of legislative intent to the contrary. Landgraf reminds us that antiretroactivity presumptions are founded in fairness --- in the idea that the persons should conform their conduct according to what the law is. To do otherwise is to allow law makers "to sweep away settled expectations suddenly,"

and to shake "people[s] confidence about the legal consequences of their actions." Prospective application of new laws, on the other hand, is consistent with (1) the need for "notice," (2) the equities of "reliance," (3) the benefits of "predictability" and "stability" when laws seek to reach contractual and property rights, and (4) the value associated with certainty in "planning."

The Court's constitutional concern with retroactivity revolves around a retroactive law's effect on "vested rights." Not only does the Landgraf opinion adopt Justice Story's definition of impermissible retroactive legislation ("statutes which, though operating from their passage, affect 'vested rights'"), it also redefines the Takings Clause as preventing government actions from "depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'" The court's adoption of a vested rights test is criticized in Justice Scalia's concurring opinion as being both inadequate as an approach to retroactivity and inconsistent with other Court cases involving retroactivity. The majority is nonetheless firm that the Court's new retroactivity rule prohibits "giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected."

The Court also seems to create three classes of retroactive laws. Depending upon what class it falls within, the law will be more or less likely to be voided for being impermissibly retroactive.

C. Primary Retroactivity, Secondary Retroactivity with Non-Protected Legal Status, and Secondary Retroactivity with Protected Legal Status

There is some consensus on what retroactivity is, and what it is not. Three examples of legal actions can be called retroactive, although only one of the three is certain to be void as a matter of law for being impermissible retroactive.

Example #1 is a law which alters the past legal consequences of past private actions. This is as "primary" retroactivity. Assume that a developer purchases a parcel of land in 1970 which is zoned with a one-half acre minimum lot size. Pursuant to this zoning classification, the developer builds twelve homes on one-half acre lots on the six acres. In 1995 the zoning authority changes the minimum lot size to two acres, and makes the new zoning restriction retroactive to 1970. The effect of the new zoning law is that in 1970 the developer had permission to build only three houses on the six acres. The 1995 zoning change has altered the past legal consequences (building a home on one-half acre lots is permissible prior to 1995) of past private actions (the developer built home on one-half acre lots prior to 1995). Such primary retroactivity is almost surely void. The Landgraf decision terms these laws as "explicitly retroactive legislation, i.e., statutes . . . enacted to take effect from a time anterior to their passage." See also *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1127 (D.C. Cir. 1985).

Example #2 is a law which alters the future legal consequences of past private actions. Laws which have exclusively future effect, but which affect the

legal future consequences of past private behavior, and thereby expectations arising from past action, are characterized as "secondary" retroactivity. This is by far the most frequently occurring form of retroactivity. Assume that the developer in the above paragraph purchased six acres in 1970, when the land use planning laws permitted houses to be built on one-half acre lots, but did not do anything with the land for 25 years. Assume also that in 1995 the zoning was changed to permit only a two-acre minimum lot size, but that this change, unlike the change in Example #1, is to be effective only after 1995. Although seemingly prospective in application, the new law has a retroactive effect on the past actions of the developer. The developer may have purchased the land in 1970 with the expectation that it would continue to be zoned for one-half acre lots, permitting eventual construction of up to twelve homes. The 1995 change permits only three homes, thus having an economic effect on the decision to buy in 1970, where that decision may have been made on the assumption that the lot size requirements would not be altered, and that twelve homes could someday be built. Despite the fact that the economic consequences could be severe for facts originating antecedent to the new law, this kind of secondary retroactivity is usually thought to be acceptable..

Secondary retroactivity affecting private actions that have no protected legal status is sometimes not termed retroactivity at all. The Landgraf decision refers to this kind of secondary retroactivity when it says "[a] statute does not operate

‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based on prior law.” See also *Fleming v. Rhodes* 331 U.S. 100, 107 (1947) (“federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution”); *Dyce v. Salaried Employees’ Pension Plan*, 15 F.3d 163, 166 (11th Cir. 1994); *Pinnock v. International House of Pancakes*, 844 F. Supp. 574 (S.D. Cal. 1993).

Example #3 is a law which alters the future legal consequences of past private action, but unlike Example #2, those past private actions may have protected legal status with respect to the new law. This third kind of retroactivity may be characterized as “legal status” retroactivity, because the new law is affecting neither the past legal consequences of past private actions (primary retroactivity), nor just the future legal consequences of past private actions (secondary retroactivity). The new law is also affecting the future consequences of past private actions which may have some legal status regarding the new law. If the past action has provided the party with “protected” legal status, a law affecting only the future legal effect of the past action may be void for interfering in the future with a previously protected legal status. If the past action has resulted in legal status, but not protected status, the normal presumptions of the validity of secondary retroactivity will apply, and the new law will survive.

In the case of the developer who purchased the six acres in 1970, assume that in 1980 the land was platted by the county under then current law to provide for twelve homes on the six acres, consistent with the then-applicable one-half acre minimum lot size requirement. Assume that no homes are built before 1995, but in 1995 the county changes the minimum lot size to two acres, and then abolishes all platting for which construction has not begun, effective in 1995. The 1980 platting has been abolished, the new two-acre minimum lot size requirement does not permit the twelve homes to be built on the 12 platted lots, and the legal status (the 1980 platting) of past private actions (the 1970 purchase of the land) has been altered in the future by the 1995 law. The difficult, and often-litigated question is whether the past legal status (the platting) is “protected,” thereby preventing its future alteration. The ability of the law to operate on past actions usually depends on the precise nature and character of the legal status of these past actions under the past law. See, e.g. *L.M. Everhart Construction v. Jefferson County Planning Com’n*, 2 F.3d 48 (4th Cir. 1993) (approval of a subdivision plat does not create a vested right); *Friends of the Law v. King County*, 869 P.2d 1056 (Wash. 1994) (approval of preliminary plat did create a vested right).

The Landgraf opinion seems to assume that private actions have protected legal status with respect to retroactive laws in one of two situations. First, protected legal status attaches when the law “takes away or impairs vested rights acquired under existing laws.” This occurs when there is a vested right, and the

right is impaired by retroactive application of the new law. See, e.g., *United States v. Stella Perez*, 839 F.Supp. 92 (D.P.R. 1993); *Saint Vincent Hospital and Health Center v. Blue Cross and Blue Shield of Montana*, 862 P.2d 6 (Mont. 1993). The Court seems to define a vested right as a right associated with an event that is “completed” before operation of the new begins (“transactions already completed”). See also *Miller v. Florida*, 482 U.S. 423, 430 (1987) (“a law is retrospective if it ‘changes the legal consequences of acts completed before its effective date.’”).

Several, there is protected legal status when a law retroactivity “creates a new obligation, imposes a new duty, or attaches a new disability or liability for transactions already past.” See e.g., *Edwards v. Edwards*, 863 P.2d 513 (Or. App. 1993); *OSI Industries v. Utah State Tax Com’n*, 860 P.2d 381 (Utah App. 1993)

IV. TAKINGS AND RETROACTIVITY

Case law tends to simplify the three definitions of retroactivity by relying on a dichotomy: A law is considered to operate prospectively (and permissibly) when it implicates conduct occurring on or after the law's effective law. Conversely, a law is considered retroactive (and preemptively impermissible) when it alters the legal consequences of conduct occurring before the law's effective date. Of course, often it is difficult to characterize a law as either retroactive or prospective, because even if the law is made applicable to

transactions or conduct occurring after the law's effective date, such a law may indirectly, and significantly, affect the outcome of transactions and conduct occurring before its effective date. Most courts deal with this reality by relying on the following rule: A law does not operate retroactively simply because its application requires some reference to antecedent facts.

The case law dichotomy between prospective and retroactive laws is roughly the difference between "secondary" and "primary" retroactivity. In the former case (secondary retroactivity, or prospectivity), the future legal effect of a present action is changed, even if the present action originated in the past, and will become less desirable in the future. In the latter case (primary retroactivity, or retroactivity), an act lawful when completed in the past becomes unlawful by operation of new law.

Case law also recognizes a third kind of factual situation which may precipitate retroactivity concerns. This is when past actions or transactions have resulted in the creation of past legal rights, duties, or limitations with respect to such actions/transactions. In such a case, a law is deemed to be impermissibly retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." This third rule of retroactivity, adopted by the Landgraf Court, is similar to "legal status retroactivity," because the legal difficulty with the law is not because it operates in

the future on past private behavior (secondary retroactivity), but because it affects the future legal effect of past actions that in the past may have had some kind of protected legal status. The Takings Clause provides the most protected legal status to private actions affected by secondary retroactivity. See *United States v. Security Industrial Bank*, 459 U.S. 70 (1982); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

Perhaps the easiest way to understand retroactivity is to visualize a timeline which begins with the "old law," and ends with the future legal effects of a "new law" on facts arising either under the "old" or "new" law. The general chronological sequence of retroactivity starts with the old, pre-existing law. Pursuant to this law, or in reliance on this law, or with this law as a backdrop, private actions take place. These private actions can take one of three forms. First, they may be plans or preliminary decisions that are neither completed nor given any legal status before the new law is adopted. Using the example of the developer of the six acres, this kind of private action would be the developer's decision to defer other land purchases so that sufficient funds are available eventually to purchase the six acres. Second, they may be private marketplace transactions that are completed or consummated before the law, but which have no particular protected legal status vis-à-vis the new law. An example would be the developer's purchase of the land when the law permitted one-half acre building sites. The land purchase has legal status, and was likely made because the

developer had an expectation that twelve homes could be built there. But the land purchase, alone, probably cannot prevent future application of a two-acre minimum size requirement. Third, they may be private actions that are both completed and given protected legal status before adoption of the new law. If the developer not only purchased the six acres, but also successfully had the land platted by the appropriate planning authorities for 12 lots before adoption of the two acre per lot limitation, the developer would have completed a transaction (the purchase) with possibly protected legal status (the platting) prior to the new law.

When a new law is adopted that addresses the same subject as the old law, and when private actions have taken place under the old law, several outcomes are possible. The easiest case (Case I) to predict is when the new law is not meant to be retroactivity applied to past private actions, even in the future. This can occur explicitly, when the maker of the new law includes in it a grandfather clause or a “subject to valid existing rights” provision. It may also occur implicitly, when the new is interpreted to apply only prospectively.

A more difficult case (Case II) occurs when the past private action has resulted in the creation of a legally enforceable substantive right or duty prior to adoption of the new law, and when the new law affects that right or duty. The new law can affect the right or duty by (1) voiding it or making it unenforceable, (2) abolishing it and replacing it with a new right or duty, or (3) modifying or impairing it. If the new law does any of the above, and if it is operative for a time

prior to the effective date of the new law, the new law has primary retroactivity and is usually void.

If the new law affects pre-existing rights or duties only in the future, it has secondary retroactivity. If the past rights and duties have protected legal status with respect to the new law with future effect (typically because they are afforded protection by some constitutional principle, such as the Takings Clause), the new law has protected legal status retroactivity, and will likely be void. See, e.g., *Skip Kirchdorfer, Inc. v. U.S.*, 6 F.3d 1573 (Fed. Cir. 1993); *Blumberg v. Pinellas County*, 836 F. Supp. 839 (M.D.Fla. 1993). If the past rights and duties have not protected legal status, the new law has simple secondary retroactivity. Such secondary retroactivity is often viewed by courts as equivalent to prospectivity. Laws with exclusively future effect which change the consequences of past private actions which have no protected legal status (particularly under the Takings Clause) are usually able to resist a retroactivity challenge. See, e.g., *Costanino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994).

The most difficult case (Case III) is when there is some past private action which has not yet matured into a substantive legal right or duty, but which was initially undertaken in reliance on the old law. A new law may impose unexpected future legal effects on such past events. When this past private action has no past legal effect (e.g., a developer who defers economic decisions in anticipation of taking future action consistent with the old law), the new law may affect the

future consequences of this past action, and thereby thwart expectations that may have arisen from the action. This is permissible secondary retroactivity. But when this past action has some past legal consequence (e.g., when the developer purchases land in reliance on the old law, or when the developer purchases land *and* receives platting from the county), then future applications of the new law to the antecedent facts (secondary retroactivity) may not only defeat private expectations, but also interfere with the legal status of the past action. Such “legal status” retroactivity is similar to secondary retroactivity because it affects the future legal consequences of past actions. Although secondary retroactivity is normally acceptable (and often classified as prospectivity), the “legal status” form of secondary retroactivity will be impermissible if the new law interferes with past private action which has “protected” legal status with respect to the new law.

Protected legal status may occur when the past actions may not have ripened into a legally protected right or duty, such as a property or contract right, but which may nonetheless have sufficient legal consequence in relationship to the new law to resist its application. In the case of the developer who contemplates the purchase of six acres of land for the building of 12 homes, the mere purchase of the land has legal status, but probably not sufficient legal status to protect the developer from imposition of a subsequent two-acre minimum lot size requirement. However, the purchase of land, coupled with county approval of a plat for the land with 12 building sites, may have enough protected legal status to

prevent the new two-acre lot size rule from applying to the platted land. This is because a legally approved plat with 12 building sites on six acres may be considered a vested property right, which would be interfered with by a rule imposing a two-acre minimum lot size on the six acres.

There are, then, two kinds of legal status for purposes of retroactivity.

Non-protected legal status describes a private action that has a legal effect, but not in relation to the new law. Protected legal status is when a private action not only has a legal effect, but also a legal effect capable of defeating secondary retroactive application of the new law. A private action characterized as having protected legal status may be immunized from secondary retroactivity if that action is seen as a constitutionally protected "substantive" right or duty, such as a contract right, *In re Workers Compensation Refund*, 842 F. Supp. 1211 (D. Minn. 1994), or a property right protected by the Takings Clause. *Shelden v. U.S.*, 7 F.3d 1022 (Fed. Cir. 1993). If a private party cannot prove the existence of such a substantive legal right or duty having protected legal status, the party may still prevent secondary retroactive application of the new law if the party can successfully allege that the action otherwise subject to the new law has one of two kinds of protected legal status.

First, a private action is likely to have protected legal status if it is deemed to be a "vested right." The term is conclusory, and "there are no bright line tests to determine what constitutes a vested right or when that right accrues." Some courts

assume that a vested right must be a complete and consummated right to present and future use or enjoyment, which is not a mere expectation based on a continuance of existing law, and where the interest does not depend upon an uncertain event or period. In determining whether a new law impairs vested rights in the future, other courts do not focus on whether there is a "right" that is "vested," but whether the law defeats bonafide reasonable intentions, or surprises persons who have long relied on a contrary state of law. See, e.g., *Mamcopa County v. Arizona*, 866 P.2d 158 (Ariz. 1993).

Second, some courts are willing to confer on past actions protected legal status when the new rule makes worthless substantial past investment incurred in reliance upon a prior rule which either encouraged or in some way authorized the past actions. In this second case, the question of protected legal status retroactivity is not judged according to whether there is a vested right, but on whether the secondary retroactivity is reasonable, or equitable. See, e.g., *Hy Kom Development Co. v. Manatee Cty*, 837 F. Supp. 1182 (M.D.Fla. 1993).

OLD LAW			NEW LAW	DEFINITION	APPLICATION OF NEW LAW
CASE I	Private Action	expectations but no right/duty	Inapplicable to all past private action	Prospectivity	Impermissible
	Private Action	right/duty	Inapplicable to all past actions resulting in right/duty		
CASE II	Private Action	right/duty	deny, void, make unenforceable or illegal right/duty	Primary Retroactivity	Impermissible
	Private Action	right/duty	deny, void or make unenforceable or illegal right/duty	Secondary Retroactivity	Permissible
	Private Action	right/duty	right/duty abolished and replaced with new right/duty	Primary Retroactivity	Impermissible
	Private Action	right/duty	right/duty abolished and replaced with new right/duty	Secondary Retroactivity	Permissible
	Private Action	right/duty	right/duty impaired or modified	Primary Retroactivity	Impermissible
	Private Action	right/duty	right/duty impaired or modified	Secondary Retroactivity	Permissible
	Private Action	right/duty with protected legal status under constitutional law	right/duty impaired, modified, or abolished	Secondary Retroactivity with Protected Legal Status	Impermissible
CASE III	Private Action	expectations, plans and transactions without legal effect	expectations altered or defeated	Secondary Retroactivity	Permissible
	Private Action	completed transactions with legal effect	expectations from completed transactions altered or defeated	Secondary Retroactivity with Non-Protected Legal Status	Permissible
	Private Action	completed transactions creating vested rights	expectations from completed transactions altered or defeated	Secondary Retroactivity with Protected Legal Status	Impermissible
	Private Action	completed transactions and investments made in reasonable reliance on old law	investments made worthless	Secondary Retroactivity with Protected Legal Status	Impermissible

Nature of "New" 1995 Law	1960 Law [Old County Law] (zoned 1/2 acre lot size)	1990 Law [Private Conduct]	1995 Law [New County Law] (rezoned 2 acre lot size)
<u>Prospectivity</u>		<ul style="list-style-type: none"> 6 acres purchased by developer 12 homes built by developer on 12 sites of 1/2 acre 	Only 3 homes permitted on the 6 acres purchases. Effective only for private transactions completed after 1995. Effective in 1995, subject to void existing rights.
<u>Primary Retroactively</u> (Past legal consequences of past private actions)		<ul style="list-style-type: none"> 6 acres purchased 12 homes built on 12 sites of 1/2 acre 	Effective in 1960
<u>Secondary Retroactively</u> (Future legal consequences of past private actions which have ripened into a right/duty, which do not have protected legal status)		<ul style="list-style-type: none"> 6 acres purchased (expectation that 12 homes possible) 	Effective in 1995
<u>Secondary Retroactively</u> (Future legal consequences of past private actions which have ripened into a right/duty, which do have protected legal status)		<ul style="list-style-type: none"> 6 acres purchased Contract with county to supply water, sewage, and roads for 12 homes Sales Ks with 12 home buyers 	Effective in 1995
<u>Secondary Retroactively with Non-Protected Legal Status</u> (Expectations and plans without legal effect)		Plans, preliminary decisions, money set aside to purchase 6 acres	Effective in 1995
<u>Secondary Retroactively with Protected Legal Status</u> (Completed transactions creating vested rights)		<ul style="list-style-type: none"> 6 acres purchased County platting for 12 sites and county issuance of 12 building permits 	Effective in 1995
<u>Secondary Retroactively with Protected Legal Status</u> (Completed transactions made in reliance on old law)		<ul style="list-style-type: none"> County assurances that 12 homes would be acceptable on 6 acres 6 acres purchased 	Effective in 1995